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In the Supreme Court of the United States

OCTOBER TERM, 1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether employer contributions to union trust funds for health and welfare, pension, and training are "wages" for purposes of computing compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. IV) 901 *et seq.*

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v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-16a) is reported at 670 F.2d 208. The opinions of the Benefits Review Board (Pet. App. 17a-22a, 28a-35a) are reported at 12 Ben. Rev. Bd. Serv. (MB) 87 and 6 Ben. Rev. Bd. Serv. (MB) 754. The opinions of the administrative law judges (Pet. App. 23a-26a, 36a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1981. A petition for rehearing was denied on January 14, 1982. The petition for a writ

of certiorari was filed on April 13, 1982, and was granted on October 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

33 U.S.C. 902(13) provides:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

STATEMENT

1. From November 1973 until he was fatally injured while performing construction work in the District of Columbia in April 1974, James H. Hilyer was employed as a laborer by petitioner Morrison-Knudsen Construction Company ("the company") (Pet. App. 29a, 37a). Hilyer was a member of Local 456 of the Laborers' District Council of Washington, D.C. and Vicinity, which had a collective bargaining agreement with Morrison-Knudsen in effect during that time (*id.* at 6a). Under the contract, the company was required to pay each covered employee at a specified hourly rate; in addition, for each hour that each employee worked the company was required to pay 28 cents into a health and welfare fund, 35 cents into a pension fund, and five cents into a training fund (*ibid.*).[1] These funds provide employee benefits such

[1] Section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c), permits an employer to contribute to trust funds established by unions for the sole and exclusive benefit of the employer's employees, provided the

as life insurance, health insurance, retirement benefits, and career training (*id.* at 9a).[2] The contributions were made directly to the trust funds, not to the employees, and the individual employees had no role in the funds' management (*id.* at 9a; J.A. 32-33).

Immediately upon Hilyer's death, the company began paying death benefits to his widow, respondent Sonia Hilyer, and his minor children pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act ("the Act" or "the LHWCA"), 33 U.S.C. 901 (& Supp. IV) *et seq.*, which at the time was made applicable to employment in the District of Columbia by D.C. Code Ann. § 36-501 (1973) (Pet. App. 5a-6a, 38a).[3] The statutorily prescribed

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trust funds meet certain standards specified in that subsection. See, *e.g.*, *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 328-329 (1981); *Arroyo* v. *United States*, 359 U.S. 419, 420 (1959).

[2] The collective bargaining agreement specifies that the trustees shall use the payment to the health and welfare fund for the benefit of the employees, their families and dependents, "for medical, dental, and/or hospital care, compensation for injuries, and/or illness resulting from occupational activity, or for unemployment benefits, or for the purchase of insurance covering life and accidental death, accident disability benefits, hospitalization, surgical, medical and sickness benefits" and, in the discretion of the trustees, for "any other type of health and welfare benefits" (J.A. 38). Payments to the pension and disability fund must be used for pension and disability benefits (J.A. 38-39), and training fund payments must be used for "insuring adequate trained manpower to perform the work covered by this collective bargaining agreement" (J.A. 40).

[3] The District of Columbia has enacted a new workers' compensation statute, which became effective on July 26, 1982. D.C. Code Ann. § 36-301 *et seq.* (1981). The validity of that statute was recently upheld by the District of Columbia Court of Appeals. See *District of Columbia* v. *Greater Wash-*

death benefits represent a percentage of the injured employee's annual earning capacity as measured by that employee's, or a representative employee's, "average weekly wage" at the time of the injury and during the previous year. 33 U.S.C. 910. Under 33 U.S.C. 909(b), respondent Hilyer is entitled to receive 50%, and each of her two minor children 16⅔%, of the decedent's "average weekly wage"; however, the total amount may not exceed 66⅔% of such wages.[4]

Respondent Hilyer disputed the amount of the benefits being paid, contending, *inter alia*, that the calculation of her husband's "average weekly wage" erroneously failed to include his employer's contributions to the three union trust funds (Pet. App. 6a). An administrative law judge rejected her contention (*id.* at 7a, 46a), and the Benefits Review Board affirmed that portion of his order (*id.* at 33a).[5] The

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ington Central Labor Council, 442 A.2d 110 (1982), petitions for cert. pending, Nos. 82-116 and 82-146. The general definition of "wages" in the new District of Columbia statute (D.C. Code Ann. § 36-301(19) (1981)) is the same as that in the LHWCA. More specifically, however, the new statute provides that the "average weekly wage" and "total wages" includes the "reasonable value for board and lodging received from the employer plus gratuities declared for tax purposes by the employee." D.C. Code Ann. § 36-311(b) (1981).

[4] The statute also establishes a minimum level of death benefits (33 U.S.C. 909(e)) which is based in part upon the "national average weekly wage" computed pursuant to 33 U.S.C. 906(b). The LHWCA defines the "national average weekly wage" as "the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls." 33 U.S.C. 902(19).

[5] The Board remanded for reconsideration of the attorney's fees award (Pet. App. 34a). On remand, an administrative law judge entered a new award (*id.* at 23a-26a), which subsequently was modified by the Board (*id.* at 17a-22a).

Board ruled that the statutory definition of "wages" in 33 U.S.C. 902(13) made clear that only those "values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage" (Pet. App. 32a). Contrasting the employer payments with overtime and vacation pay, which are "wages" within the meaning of the LHWCA, the Board found the employee's right to these funds and the value to him of the trust fund contributions too "speculative" to be considered wages (*id.* at 33a). It also noted that inclusion of these forms of benefits would cause problems in computing an employee's average weekly wage by comparison to a similarly-situated employee under 33 U.S.C. 910(b) in cases, such as Hilyer's, where the injured employee did not work in the same employment for a full year (*ibid.*).

2. The court of appeals reversed (Pet. App. 4a-16a). It concluded that the employer's benefit fund contributions were identifiable, calculable values that must be included in the determination of Hilyer's average weekly wage (*id.* at 8a-9a). Although the contributions were made not to employees but to union funds over which individual workers had no control, the court found that the funds were a "channel" for the company to provide benefits to its employees (*id.* at 9a). The court also found that each of the benefits had "substantial economic value" to the employees because, without the funds, the employees would have had to spend their own money to obtain similar insurance policies, career training, or pensions (*id.* at 9a). Recognizing that the sums contributed by the employer probably would not purchase equivalent benefits on the open market, the court nonetheless concluded that "the most reasonable course is to measure the value of the fringe benefits by the amount of the

employer's contributions to the benefit funds" (*id.* at 12a).

SUMMARY OF ARGUMENT

A. The statutory definition of "wages" in the LHWCA embodies the common sense concept of wages —money paid by the employer to the employee as recompense for his labors, plus traditional nonmonetary wage substitutes such as room and board. The employer trust fund contributions at issue here, commonly thought of as fringe benefits, do not fall within these categories. Clearly, Congress did not specifically contemplate when it passed the LHWCA in 1927 that employer-financed fringe benefits, which were unusual at that time, would be treated as wages, and it has not acted to amend the statute to cover them.

Employer trust fund contributions do not fall within the statutory language as a "similar advantage" to room and board. The wage substitutes listed in the statute are immediately available and given directly to the employee, while the contributions here are paid to the union trust funds and the benefits ultimately received by the employees from these funds are only contingent. The funds do not act simply as a "channel" for benefits to pass to employees. The employee has no voice in where the contributions are invested or how the funds are administered. Moreover, the contributions, which are not taxed as income to the employee, are not truly made on the individual employee's behalf; whatever benefits he ultimately receives from the funds do not correlate directly with the contributions made as a result of his labor. See *Teamsters* v. *Daniel*, 439 U.S. 551, 560-561 (1979).

Contrary to the court of appeals view, not every item of value paid by an employer or received by an

employee as a result of his labor is to be included in the base for calculating LHWCA benefits; that base is restricted to those items of value that are "wages." This Court has indicated on several occasions in other contexts that the types of contributions at issue here are not generally encompassed by the term "wages." See *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959). In the specific context of LHWCA benefits, the longstanding administrative interpretation, upheld by the Benefits Review Board, has been that employer trust fund contributions are not "wages," and they have never been included by the Bureau of Labor Statistics in the calculation of the "national average weekly wage," upon which minimum and maximum LHWCA benefit levels are based.

Significantly, in 1964 Congress amended the Davis-Bacon Act, 40 U.S.C. 276a, a statute enacted at approximately the same time as the LHWCA, to include employer trust fund contributions in the definition of "wages." Congress' failure to alter the original definition of "wages" in the LHWCA, particularly in light of the established administrative practice, strongly indicates that such contributions should not be read into the wage base for computing LHWCA benefits.

B. The court of appeals erred in relying on a rule of liberal construction in favor of the claimant, even though his right to recover under the Act was not disputed, without giving due consideration to other policies of the Act. The LHWCA is to be liberally construed to effectuate its remedial purposes, but the decision below does not further the purposes of the Act. Most of the employee benefits that are attributed to trust fund contributions are ones that LHWCA beneficiaries do not need to purchase independently in the future. For example, to the extent that an em-

ployee receives a life insurance policy as a result of contributions to the trust fund, the beneficiaries receive the proceeds of that policy upon the employee's death, and they do not have to bear any future expense of paying premiums on a policy on the employee's life. Other trust fund benefits such as training, disability insurance, and unemployment insurance are also irrelevant once the employee is no longer employed. By the same token, an LHWCA beneficiary does not have to spend money to provide for a future pension, because LHWCA award payments do not cease when the covered employee would have reached retirement age. Thus, the policy underlying the provision of LHWCA benefits is not furthered by increasing the level of those benefits to account for employer trust fund contributions.

Moreover, the court of appeals' decision creates serious practical problems in the administration of the LHWCA that will substantially undermine other policies of the Act. The question of the amount of the LHWCA benefit is only rarely litigated under the present system; the decision below invites an explosion of such litigation in the future over the issues of whether particular fringe benefits should be included in the wage base and how those benefits should be valued. This increase in litigation in cases that otherwise might have been uncontested or settled informally will overwhelm the already strained LHWCA administrative system and seriously impair the Act's important policy in favor of prompt and certain disposition of claims.

The inclusion in the wage base of employer contributions to union trust funds also raises the likelihood that the LHWCA award of many employees will exceed the take-home pay that they received while working, thus giving disabled employees a strong dis-

incentive to return to work. Finally, if the decision below is upheld, it would be anomalous if trust fund contributions were not also included in the "national average weekly wage." This would significantly complicate the task of the Bureau of Labor Statistics in calculating that figure and might well make it impossible to meet the timetable mandated by statute. See 33 U.S.C. 906(b)(3).

ARGUMENT

EMPLOYER CONTRIBUTIONS TO UNION TRUST FUNDS ARE NOT PART OF AN EMPLOYEE'S "AVERAGE WEEKLY WAGE" FOR PURPOSES OF COMPUTING BENEFITS UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

A. The Statutory Definition Of "Wages" Does Not Include Employer Contributions To Union Trust Funds

1. The inquiry into whether employer contributions to a union trust fund are part of an employee's "average weekly wage" begins with the language of the statute. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). "Wages" are expressly defined in the LHWCA, 33 U.S.C. 902(13), as the "money rate at which the service rendered is recompensed * * *, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received * * * from others than the employer." The plain meaning of this definition is that LHWCA "wages" embody the common sense concept of wages, *i.e.*, the actual money payments made to an employee by his employer as recompense for his labors, tips from customers that supplement this salary, and traditional nonmonetary wage substitutes supplied by the employer, such as room and board. The employer trust fund contributions at issue here, which are commonly thought of

as fringe benefits rather than wages, do not fall into any of these categories and thus do not appear from the face of the statute to be "wages" within the meaning of 33 U.S.C. 902(13).

There is nothing in the legislative history of the LHWCA that modifies the apparent meaning of the statutory definition and indicates a congressional intent that trust fund contributions by employers be treated as part of an employee's "average weekly wage." Hence, the statutory language is controlling. See, *e.g.*, *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981). Indeed, it is clear that Congress did not contemplate when it passed the LHWCA in 1927 that such benefits would be considered "wages," because employer-financed fringe benefits were quite unusual at that time;[6] hence, Congress could not have intended to include them in the base used to calculate disability and death benefits. In the absence of any change in the statute, therefore, it would appear that such fringe benefits are still not included today, even though they have become more common. Cf. *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 280 (1980) (where statute has not been amended, conditions prevalent when LHWCA was passed are most indicative of congressional intent). In the view of the court of appeals, however, Congress defined "wages" in such a flexible and broad fashion that, without amendment, the original definition now extends to employer trust fund contributions not con-

[6] A Labor Department publication from that era documents that it was unusual for employers to provide such health and welfare and pension benefits to their employees. See United States Bureau of Labor Statistics, *Beneficial Activities of American Trade Unions*, Bul. No. 465, at 2-4, 31, 139, 148-152 (Sept. 1928). See also S. Rep. No. 963, 88th Cong., 2d Sess. 2 (1964).

templated at the time. See Pet. App. 8a-9a; see also *Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F.2d 1336, 1344 (9th Cir. 1982). But the court's assumption that LHWCA wages include all "values received by an employee that are readily identifiable and calculable" (Pet. App. 8a) ignores the language of the statutory definition and its clear limitations.

The court of appeals emphasized (see Pet. App. 13a) that the definition of "wages" in Section 902(13) is not restricted to monetary salary payments but includes other forms of compensation as well. The trust fund contributions at issue here are quite different, however, from the types of alternative compensation specified in the statutory definition—"board, rent, housing, lodging, or similar advantage." Those benefits are nonmonetary wage substitutes that are easily converted to a monetary value and that are provided directly to the employee by the employer for the employee's immediate use. Hence, unlike the contributions here, they are generally taxable to the employee when received.[7] The contributions at issue here, by contrast, are payments made directly to the union trust funds. It is these funds that provide the employee with whatever insurance policies or contingent benefits he receives. Nor are the benefits immediately available. Under the pension and disability plan involved here (J.A. 58-71), for example, in no event can an employee receive any benefit before he reaches the age of 55. And many

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[7] Meals or lodging furnished for the convenience of the employer, if they are furnished on the business premises, and, in the case of lodging, if it is a required condition of employment, are excluded from gross income under 26 U.S.C. (& Supp. IV) 119.

employees, including James Hilyer himself,[8] will never receive any benefits because of service and vesting requirements.

The court of appeals stated (Pet. App. 9a) that the funds "are no more than a channel" by which the employer provides certain benefits for the employees. But it cannot be maintained that the situation here is no different than if the employer had made the contributions directly to the employee, who then invested them in the union funds. The fact that the employee does not receive the contributions from the employer is more than a technicality; he has no choice whether to invest the money in union funds and he has no voice in how the funds are administered (see J.A. 32-33). Moreover, the funds are administered in such a manner that the benefits for a particular employee are not tied directly to the contributions made by the employer that correspond to the hours worked by that employee; hours worked are used as a convenient way to measure an employer's overall obligation to the fund, not as a means of measuring its obligation to any particular employee. See *Teamsters* v. *Daniel*, 439 U.S. 551, 560-561 (1979).[9] Thus, it

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[8] Hilyer did not work for petitioner Morrison-Knudsen for at least one year (Pet. App. 29a) and therefore apparently did not even qualify for a death benefit under the union pension plan (see J.A. 68).

[9] For example, under the pension and disability plan agreement involved here, the amount of an employee's pension credit has no direct correlation with his hours worked for which the employer has made contributions to the fund. Employees receive pension credit for hours worked during years when no employer pension fund contributions were required (J.A. 60-61). Employees receive no pension credit for fewer than 200 hours worked during the calendar year, even though the employer is obligated to make pension contributions for those hours (J.A. 61). Employees receive the same pension

is not even accurate to describe the contributions held by the court of appeals to be part of Hilyer's "average weekly wage" as actually having been made on Hilyer's behalf. *Ibid.*[10] Indeed, the fact that these types of employer contributions cannot be equated with a particular employee's compensation is reflected in the specific exclusion of such contributions from gross income under federal income tax law. See 26 U.S.C. 106. In short, it stretches the language of the statute beyond acceptable limits to hold that the employer trust contributions at issue here are a "similar advantage" to board and lodging.[11]

2. The court of appeals' decision fails to recognize the limitations inherent in the LHWCA concept of "wages." The court's conclusions that trust fund "contributions are an important part of the employees' total compensation, and an equally important part of the employer's labor cost" (Pet. App. 10a-11a n.7), and that "each of these benefits has substantial eco-

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credit for working widely different numbers of hours; for instance, they receive ⅛ credit for working any amount between 200 and 400 hours per calendar year (J.A. 61). And, of course, an employee may lose credit for hours for which contributions have been made, and thus never receive any pension benefits, if he has not vested in the plan (J.A. 61-62).

[10] The notion that training fund contributions are made on the employee's behalf is even more illusory. The purpose of the training fund is to "insur[e] adequate trained manpower to perform the work covered by [the] collective bargaining agreement" (J.A. 40) and thus does not even appear to be directed at benefitting individual employees.

[11] In this connection, it is noteworthy that the new District of Columbia workers' compensation statute specifically provides that "total wages" include the value of "board and lodging" but makes no mention of trust fund contributions. See D.C. Code Ann. § 36-311(b) (1981); note 3, *supra*.

nomic value to the employees" (*id.* at 9a) miss the point. Not every item of value paid by an employer or received by an employee as a result of his labor is encompassed by the term "wages."

Certainly the concept of "wages" does not necessarily cover the fringe benefits involved here. This Court has specifically held in other contexts that employer trust fund contributions are not encompassed by the term "wages." The leading case is *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), where the Court held that such employer contributions were not entitled to the priority given "wages * * * due to workmen" under the old Bankruptcy Act, 11 U.S.C. 104(a)(2).[12] The Court stated that "not all types of obligations due employees from their employers are regarded by Congress as being within the concept of wages, even though having some relation to employment." 359 U.S. at 32. The Court then explained that the fund contributions lacked "the customary attributes of wages" (*id.* at 33) because the amounts were unrelated to the particular employee's productivity, the employee had no legal interest whatsoever in the contributions, which were made directly to the funds, and the collective bargaining agreement itself made clear that the parties considered these payments to be something other than wages. *Id.* at 32-33. See also *Joint Industry Board* v. *United States*, 391 U.S. 224 (1968) (employer contributions to a plan containing individual annuity accounts are not "wages" under 11 U.S.C. 104(a)(2)).

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[12] In the new Bankruptcy Code, Congress has directly addressed this question and has drawn an explicit distinction for priority purposes between wages and fringe benefits like the trust fund contributions involved in this case. See 11 U.S.C. (Supp. V) 507(a)(3), (4).

In addition, with respect to pension benefits in particular, the Court has noted in connection with veterans' reemployment rights that pension benefits are predominantly a reward for length of service, not compensation for work performed. *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 592-594 (1977). The Court acknowledged that the cost of pension benefits is a current one that "is a subject of collective bargaining, and future benefits may be traded off against current compensation," but it explained that these features are characteristic of any benefit and therefore "of little assistance in determining whether a particular benefit recompenses labor or rewards longevity with an employer." *Id.* at 592-593. See also *Teamsters* v. *Daniel*, *supra*, 439 U.S. at 560 ("[o]nly in the most abstract sense may it be said that an employee 'exchanges' some portion of his labor in return for [potential pension] benefits").

The court of appeals found (Pet. App. 13a) that *Embassy Restaurant* was of no relevance here because the statute in that case applied strictly to "wages," not to additional forms of compensation. This distinction is specious because both cases involve the meaning of the term "wages" in the pertinent statute; the fact that the LHWCA expressly considers gratuities and room and board to be wages does not alter that inquiry.[13] Nonetheless, the court below

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[13] Moreover, what the court of appeals apparently found to be significantly different about the LHWCA was its specific mention of nonmonetary wage substitutes such as room and board. The trust fund contributions are in monetary form, however, so this factor seems irrelevant. In any event, the reasons given by the Court in *Embassy Restaurant* why trust fund contributions lack "the customary attributes of wages" (359 U.S. at 32-33) are equally applicable even if wages include such benefits as room and board supplied by the employer to the employee.

rejected *Embassy Restaurant* and erroneously relied (Pet. App. 11a-12a) on an earlier case, *United States ex rel. Sherman* v. *Carter*, 353 U.S. 210 (1957). But *Carter* does not support the decision below. In *Carter*, the Court found that a federal contractor's surety was liable under the Miller Act, 40 U.S.C. 270a *et seq.*, for employer trust fund contributions. As the Court explained in *Embassy Restaurant* (359 U.S. at 34-35), the *Carter* Court was not construing the term "wages"; rather, the Miller Act covered all "sums justly due" the employees under the contract, and the Court held that this broader language covered all the obligations of the contractor under the collective bargaining agreement. 353 U.S. at 216-218. Indeed, the *Carter* Court specifically noted that the contributions there, by the explicit terms of the trust agreement, were not to be deemed wages. *Id.* at 214, 217. Significantly, the plaintiffs in *Carter* were the trustees of the funds. The Court recognized that the employees themselves had no rights in the contributions. *Id.* at 214. Thus, it is difficult to read *Carter* to support the contention of an individual employee that trust fund contributions must be included in his wage base for the computation of workers' compensation benefits.[14]

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[14] The court of appeals' reliance (Pet. App. 10a n.6) on two lower court cases recognizing that fringe benefits such as trust fund contributions are mandatory subjects of collective bargaining under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, is similarly misplaced. Whether a particular benefit is subject to mandatory collective bargaining (as "wages, hours of employment, or other conditions of employment" (29 U.S.C. 159(a)) does not control whether it should be included in a wage base for workers' compensation benefits. Indeed, this Court has twice specifically rejected the contention that the classification of a particular benefit as

In the specific context involved here, the longstanding practice under the LHWCA has been that employer trust fund contributions are not "wages." From the inception of the Act, the Department of Labor has taken the position that fringe benefit contributions by employers are not part of the "average weekly wage" under the LHWCA. This interpretation is reflected in a 1968 Labor Department memorandum and legal opinion on the subject, which noted some of the arguments made in favor of including such fringe benefits in wages but concluded that it would be "improper" to argue for such a statutory interpretation because of the history of the Act and the Department's past practice of excluding fringe benefit contributions. Rather, the memorandum concluded, any change in the treatment of fringe benefit contributions would have to come from Congress. See United States Department of Labor, Wage and Labor Standards Administration, Bureau of Employees' Compensation, *LS/WH Program Memorandum No. 32* (June 17, 1968) (*reprinted in* American Insurance Association Amicus Br. in Support of Petition App. 1a-4a).[15] Moreover, the Bureau of Labor

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"wages" subject to mandatory bargaining under the NLRA is controlling in another context. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 592 n.16; *United States* v. *Embassy Restaurant, Inc.*, *supra*, 359 U.S. at 33 & n.10.

[15] The Department of Labor briefly departed from this longstanding interpretation in the litigation of this case before the court of appeals. The Director of the Office of Workers' Compensation Programs petitioned for review of the Benefits Review Board's order and contended that the employer's fund contributions here should have been included in determining Hilyer's average weekly wage. Upon further consideration, the Department of Labor has concluded that the correct interpretation of the LHWCA is that fringe benefits are not "wages" within the meaning of the Act, thus reverting to its previous,

Statistics has never included these contributions in its calculation of the "national average weekly wage," which, because of its role as a benchmark in setting minimum and maximum benefits, logically should contain the same ingredients as the individual "average weekly wage." The Benefits Review Board, the administrative body that hears appeals from the administrative law judge in all LHWCA cases, also has consistently held that fringe benefits are not "wages" for the purposes of computing LHWCA benefits. See, *e.g.*, *Collins* v. *Todd Shipyards Co.*, 5 Ben. Rev. Bd. Serv. (MB) 334 (1977).[16]

Given the longstanding administrative practice under the Act, the administrative interpretation that trust fund contributions are not LHWCA "wages" should be entitled to some deference. See, *e.g.*, *E.I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The fact that the LHWCA has been amended on several occasions, and was extensively amended in 1972, but no change has ever been made

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longstanding interpretation. The Director urged this view in *Duncanson-Harrelson Co.* v. *Director, OWCP*, *supra*, and he has apprised the Fifth Circuit of his position in connection with its consideration of two cases that are being held pending the decision in this case. *Levis* v. *Farmers Export Co.*, No. 81-4258; *Waters* v. *Farmers Export Co.*, No. 81-4273.

[16] In *Minick* v. *Levin Metals Corp.*, No. 80-835 (Apr. 28, 1982), the Benefits Review Board stated that it would follow the decision below, hence reversing its prior view on this issue. On July 29, 1982, the Board granted the Director's motion for reconsideration in *Minick* and announced that it would hold the case in abeyance pending the Ninth Circuit's decision in *Duncanson-Harrelson Co.* v. *Director, OWCP*, *supra*. The Director has now moved that the Board stay its reconsideration of *Minick* pending this Court's decision in the instant case.

in the definition of "wages" to include the trust fund contributions that have become a common feature of collective bargaining agreements, further buttresses the case for following the administrative construction. See, *e.g.*, *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978); *Red Lion Broadcasting Corp.* v. *FCC*, 395 U.S. 367, 381 (1969).[17] Moreover, both

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[17] The Senate recently passed a bill entitled "Longshoremen's and Harbor Workers' Compensation Act Amendments of 1982" (S. 1182, 97th Cong., 2d Sess. (1982)), which, *inter alia*, expressly excludes fringe benefits from the LHWCA definition of "wages." See 128 Cong. Rec. S9202-9217 (daily ed. July 27, 1982). Section 2(c) of the bill provides:

> (c) Section 2(13) is amended to read as follows:
>
> (13) the term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including but not limited to employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit fund or trust for the employee's or dependent's benefit, or any other employee's dependent entitlement.

Id. at S9212. The accompanying Senate Report explains that the purpose of the amendment is "to confirm past practice and congressional intent and to reaffirm the previously settled rule that fringe benefits are excluded from the definition of 'wages'" (S. Rep. No. 97-498, 97th Cong., 2d Sess. 41 (1982)), and that "the Committee [on Labor and Human Resources] expressly rejects the holding in *Morrison-Knudsen* v. *Director, OWCP*, 670 F.2d 208 (D.C. Cir. 1981)" (S. Rep. No. 97-498, *supra*, at 31).

employers and insurers have long ordered their affairs on the basis that these contributions are not included in the wage base for LHWCA benefits,[18] and their reasonable expectations should not be defeated in the absence of any clear indication by Congress. See *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978).

Congress' treatment of "wages" in the context of the Davis-Bacon Act, 40 U.S.C. 276a, confirms the view that legislative action is required in order to bring employer trust fund contributions within the definition of LHWCA "wages". The Davis-Bacon Act provides that wages paid on federally funded construction projects should accord with prevailing local wages. The Act, as originally passed in 1931, did not define "wages." In 1964, Congress amended the statute by inserting a definition of "wages," 40 U.S.C. 276a(b), to establish that employer benefit fund contributions would be considered "wages" for the purposes of the Act.[19]

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[18] Commercial workers' compensation insurance carriers have not included fringe benefits in the LHWCA benefit wage base when calculating premiums. See Alliance of American Insurers and National Association of Independent Insurers Amicus Br. 3. And testimony before Congress shows that employers have not considered them to be part of the wage base. See, *e.g.*, *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 182-183 (1972) (remarks of Ralph Hartman, representative of the Shipbuilders Council of America).

[19] Contrary to respondent Hilyer's suggestion (Br. in Opp. 8), the fact that Congress amended the Davis-Bacon Act in this fashion does not indicate in any way that it intended trust fund contributions to be included in the wage base for

In making this change, Congress explained that such fringe benefits were rare when the Davis-Bacon Act was enacted in 1931 (S. Rep. No. 963, 88th Cong., 2d Sess. 2 (1964)); hence, the concept of wages in the existing statute did not include those fringe benefits. Congress recognized that the courts had held trust fund contributions to be bargainable under the NLRA and to be "sums justly due" under the Miller Act (see pages 16-17 & note 14, *supra*), the decisions relied upon heavily by the court below (see Pet. App. 10a-12a), but nevertheless concluded that legislative action was required to include those contributions as "wages" within the meaning of the Davis-Bacon Act. By the same token, trust fund contributions were not encompassed within the concept of "wages" in the LHWCA when it was enacted in 1927, and Congress' failure to amend the LHWCA as it did the Davis-Bacon Act, although extensive amendments were made to the LHWCA in 1972, suggests that those contributions still should not be treated as "wages" under the LHWCA. See *United States*

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computing LHWCA benefits. The two statutes have completely different purposes. Congress believed that it was necessary to include these payments in "wages" under the Davis-Bacon Act because otherwise the minority of employers in an area who did not provide these benefits would have an unfair bidding advantage over those who did provide them. S. Rep. No. 963, 88th Cong., 2d Sess. 3 (1964). By the same token, failure to include these contributions would allow contractors from outside the local area to enter lower bids. *Id.* at 2. Thus, because the Davis-Bacon Act is concerned with competition between employers, it was important for Congress to consider these contributions, which affect employers' costs. That reason has no application in the LHWCA context, however, where the focus is not on the employers' costs but on compensating individual employees for their lost wages.

v. *Embassy Restaurant, Inc.*, *supra*, 359 U.S. at 31-32.[20]

B. The Court Of Appeals' Interpretation Is At Odds With Important Policies of the LHWCA

In interpreting the LHWCA to include employer trust fund contributions, the court of appeals explained (Pet. App. 13a) that it was bound to construe the Act "liberally, resolving doubts in favor of the claimant." See also *Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F.2d at 1344. This rule of construction, however, does not apply with full force in this context. It has long been recognized, of course, that, as a remedial statute, the LHWCA is to be liberally construed to effectuate its purposes. See, *e.g.*, *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U.S. 408, 412-413 (1932). Because the primary purpose of the Act is to afford compensation for injured employees, there is a policy of resolving doubtful cases in favor of the claimant where the issue is whether he is entitled to recover at all under the Act, rather than leave an injured employee without compensation. Where, as here, the entitlement to recovery is undisputed, however, and the dispute is over the amount of compensation, this rule of con-

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[20] Contrary to the suggestion in *Duncanson-Harrelson Co.* v. *Director, OWCP*, *supra*, 686 F.2d at 1344 n.6, the fact that, unlike the pre-1964 Davis-Bacon Act, the LHWCA contains a definition of "wages" does not suggest that fringe benefit contributions can be brought under the LHWCA without legislative action. Because employer trust fund contributions are not a "similar advantage" to room and board (see pages 10-12, *supra*), the definition of "wages" in the LHWCA does not cover these contributions any more than the undefined term "wages" did in the old Davis-Bacon Act.

struction does not argue as strongly for resolving doubts in favor of the claimant, since it is not the purpose of the LHWCA to maximize the amount of the benefits.[21] Rather, other policies of the Act may weigh against a ruling in favor of the claimant. Thus, in *Potomac Electric Power Co.* v. *Director, OWCP*, *supra*, 449 U.S. at 281-282, for example, the Court rejected the contention that the Act should be liberally construed to permit recovery for a permanent partial disability in excess of that provided by the statutory schedule, 33 U.S.C. 908(c).

1. The court of appeals' interpretation does not further the purposes of the Act. The purpose of keying LHWCA benefits to individualized wages is to correlate the benefits with what has been lost by virtue of the employee's death or disability, *i.e.*, to provide funds for the employee or his family to pay the bills that can no longer be paid with the employee's wages. See generally 1 A. Larson, *Workmen's Compensation Law*, § 3.30, at 19-20 (1978); H.R. Rep. No. 1767, 69th Cong., 2d Sess. 19-20 (1927).[22] Viewed in this light, it is apparent that it makes little sense for most of the trust fund contributions involved here to be included in the wage base for comptuing LHWCA awards. For example, some of the contributions paid by the company to the health and welfare fund provided policies on the

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[21] Indeed, the Act places a ceiling on the disability benefits that can be received regardless of the level of the employee's wages. 33 U.S.C. 906(b)(1).

[22] Of course, the LHWCA does not purport to provide full compensation for lost wages (see *Potomac Electric Power Co.* v. *Director, OWCP*, *supra*, 449 U.S. at 281-282 & n.23), but the percentage of compensation allowed by Congress is tied to the employee's actual pre-injury wages.

lives of the employees. An LHWCA award is not needed to replace that benefit once an employee is deceased. The LHWCA beneficaries have already received the full benefit, as the beneficiaries of the life insurance policy, of the contributions made during the employee's employment. Because, after his death, they do not have to bear the continuing expense of paying premiums on an insurance policy on the employee's life, there is no need to increase the LHWCA death benefit to compensate for the absence of future trust fund contributions. In addition, several of the other health and welfare fund benefits, such as disability insurance and unemployment insurance, have no application once the employee is no longer employed, and hence the LHWCA award should not be increased in an attempt to provide funds for the employee's family to purchase those benefits on its own. The contributions to the training fund, to the extent they are benefits to the employee at all (see note 10, *supra*), certainly provide no benefits that must be purchased independently once the employee has become disabled or has died.

Similarly, inclusion in the LHWCA wage base of employer contributions to a pension trust fund does not advance the policies of the Act. Upon an employee's death, his family receives a death benefit according to the terms of the plan that corresponds to the contributions already made by the employer to the plan; if an employee is disabled, he receives a pension depending on the degree to which he is vested in the plan.[23] Plainly, no LHWCA award is

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[23] As noted above (note 8, *supra*), because James Hilyer was not employed by the company for one year prior to his death, his family does not appear to have been entitled to any death benefit under the pension plan.

needed to "replace" these benefits that are actually received. Nor can it be said that the LHWCA award must take into account the surviving family's need to provide for retirement now that the employee is no longer accruing pension credits. There simply is no such need. The point of a pension is to provide income for an individual or a family when retirement has eliminated their regular source of income, namely, wages for employment. But when the regular source of income is an LHWCA award, a pension is unnecessary because the LHWCA payments do not cease when the employee would have reached retirement age. In other words, an LHWCA death or disability benefit comes with its own pension. To increase the level of that benefit in order to provide funds to purchase imaginary pension benefits that are in fact unnecessary creates a double recovery. See *Freer* v. *Duncanson-Harrelson Co.*, 9 Ben. Rev. Bd. Serv. (MB) 888, 891-892 (1979), aff'd in part & rev'd in part, 686 F.2d 1336 (9th Cir. 1982). In short, inclusion of employer trust fund contributions in the wage base for computing LHWCA benefits does not advance the policies underlying the provision of those benefits.

2. Moreover, the decision of the court of appeals creates serious practical problems in the administration of the LHWCA that will substantially undermine other policies of the Act. First, the decision introduces a new issue into workers' compensation proceedings. Heretofore, with rare exceptions, only money wages have been included in the LHWCA wage base and hence there has been little dispute over the amount of the benefit. If the decision of the court of appeals is upheld, however, it can be expected that many cases will involve the questions of what fringe benefits are to be included in the wage

base and how their value is to be computed. The court's formulation that the wage base must include "*all* of the identifiable value, in whatever form it may appear, that the employee was receiving in return for his labor at the time of his injury" (Pet. App. 13a) is quite broad and consequently will invite a myriad of claims that particular fringe benefits should be included. And if it is determined that the wage base must include a particular fringe benefit, litigation is bound to ensue over the method of assigning a monetary value to that benefit.[24]

Increased litigation over fringe benefits inevitably will frustrate the LHWCA's important policy in favor of prompt and certain disposition of claims. See *Potomac Electric Power Co.* v. *Director, OWCP*, *supra*, 449 U.S. at 282; *Cardillo* v. *Liberty Mutual Life Insurance Co.*, 330 U.S. 469, 476 (1947); *Norton* v. *Warner Co.*, 321 U.S. 565, 568-569 (1944). Under the existing system, where the amount of the wage base is rarely disputed, the vast majority of claims are not contested. Even with respect to those contested claims, many are resolved by informal conferences conducted by Labor Department deputy commissioners without resort to formal hearings before the Department's administrative law judges and subsequent appeals to the Benefits Review Board and the courts of appeals. Thus, the lengthy delays

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[24] Because the employer contributions involved here are in monetary form, the court of appeals sidestepped the valuation problem by designating the amount of those contributions as the "value" to be included in the wage base, even though the court recognized that these amounts did not represent the true economic value to the employee of the contributions (see Pet. App. 12a). With other types of fringe benefits, it will not be so simple to avoid the valuation problem in this manner.

these proceedings can engender are avoided.[25] The fringe benefit litigation invited by the court of appeals' decision will substantially increase the number of claims subject to these delays. And that problem is exacerbated by the fact that the resulting increase in litigation will overwhelm the LHWCA administrative system at a time when the system is already severely overburdened.[26]

Second, the increased awards that result from including trust fund contributions in wages will increase the disincentive for disabled employees to return to work. Because compensation awards are not taxable income to the recipient, an injured worker receiving an LHWCA award of 66⅔% of his earnings plus employer trust fund contributions may well have more disposable income than he did when work-

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[25] In fiscal year 1980, proceedings before the administrative law judges averaged four to four and one-half months. Report by the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 41 (Apr. 1982). The Benefits Review Board took an average of 10 months to decide a case, and, because of an increased workload, future decisions may take up to two and one-half years. *Id.* at 41-42. Proceedings in the court of appeals range from several months to years in length, depending on the circuit.

[26] A recent government study concluded that the LHWCA administrative staff is not sufficient to handle its present workload. Report of the Comptroller General of the United States, *supra*, at 30-32. The Office of Workers' Compensation Programs estimates that approximately 75% of the 59,594 lost-time injuries reported in fiscal year 1980 (excluding District of Columbia claims) (see *id.* at 31) resulted in compensation payments. The number of cases referred to administrative law judges that year was 2526, or just under 5% of the total. *Id.* at 41. Thus, a decrease as small as 5% in the number of cases resolved amicably would double the number of cases requiring formal adjudication.

ing and paying tax on his earnings. This disincentive already exists for certain highly-paid workers (see Report by the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 13-17, 26 (Apr. 1982)), but the inclusion of these fringe benefits in wages would greatly exacerbate the problem. Plainly, the purposes of the LHWCA are not served by the creation of such a disincentive to employment. See 1 A. Larson, *Workmen's Compensation Law* § 2.50, at 12 (1978); *Potomac Electric Power Co.* v. *Director, OWCP*, *supra*, 449 U.S. at 291 n.9 (Blackmun, J., dissenting).

Third, the court of appeals' decision creates a problem with respect to the computation of the "national average weekly wage," upon which minimum and maximum LHWCA benefit levels are based. To date, the national average weekly wage has been computed without including fringe benefit trust fund contributions. Given the relationship in the statutory framework between the national average weekly wage and an individual's average weekly wage, however, it would be quite anomalous to include trust fund contributions in one category and not the other.[27] On the other hand, to require the Bureau of Labor Statistics (BLS) to collect fringe benefit data so that its calculation of the national average weekly wage accords with the decision of the court below concerning individual wages would substantially complicate its task. At a minimum, it would introduce significant delays in calculating the national average

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[27] The "national average weekly wage" is defined separately in 33 U.S.C. 902(19), but that definition does not suggest that the forms of compensation included should differ from those included in the determination of an individual's average wages.

weekly wage and might well make it impossible for the BLS to meet the timetable set forth in the statute for the calculation of the national average weekly wage. See 33 U.S.C. 906(b)(3) (national average weekly wage for three quarters prior to June 30 must be made within three months). It is also likely to create massive valuation problems for the BLS.[28]

In sum, there are compelling reasons why Congress would not wish employer trust fund contributions to be included within an employee's "average weekly wage." Indeed, the approach most consonant with all of the LHWCA's policies is that such employer contributions are not "wages" under the Act. Accordingly, in the absence of any legislative indication to the contrary, the LHWCA should be interpreted in accordance with Congress' original intent, and these contributions should not be included in the wage base for computing LHWCA benefits.

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[28] From 1959 through 1977, the BLS periodically surveyed employer expenditures for employee compensation in private nonfarm industries. See, *e.g.*, United States Department of Labor, Bureau of Labor Statistics, *Employee Compensation in the Private Nonfarm Economy, 1977*, Summary 80-5 (Apr. 1980). The survey distinguished between "wages and salaries," which included all direct payments to workers, and "supplements to wages and salaries," which included payments for retirement, health benefit, and unemployment benefit programs, both private plans and government programs such as Social Security and workers' compensation. See *id.* at 4-7 & nn. 3, 4. While the BLS was able to collect this data, the 1977 figures were not published until April 1980, a delay of more than two years. This BLS survey program was discontinued after the 1977 survey "due to budget constraints." *Id.* at 1 n.2.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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